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Case No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1993

HARRY K. SINGLETARY,

Petitioner,

v.

KENNETH CUMBIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
Attorney General

BRADLEY R. BISCHOFF
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-10500
(904) 488-0600

COUNSEL FOR PETITIONER

QUESTION PRESENTED

WHETHER *COY V. IOWA*, 487 U.S. 1012 (1988), WAS ERRONEOUSLY APPLIED ON THE MERITS WHERE RESPONDENT'S CONFRONTATION CLAUSE CLAIM WAS PROCEDURALLY BARRED AND ANY CONFRONTATION CLAUSE ERROR IS HARMLESS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Harry K. Singletary, Secretary of the Florida Department of Corrections, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 991 F.2d 715 (11th Cir. 1993), and is reproduced in the appendix to this pleading.[1] [A-1 to A-20].

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1 [A-] represents a citation to the materials contained in the appendix to this pleading.

The report and recommendation of the Federal Magistrate Judge is reproduced in the appendix to this pleading. [A-21 to A-50].

The decision of the Florida appellate court is reported at 539 So. 2d 538 (Fla. 1st DCA 1989), and is also included in the appendix to this pleading. [A-51].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on May 26, 1993. A petition for rehearing was filed and subsequently denied on July 16, 1993.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment VI, provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

Section 92.54, Florida Statutes (1987), provided:

> 92.54 Use of closed circuit televisions in proceedings involving sexual offenses against victims under the age of 16.
>
> (1) Upon motion and hearing in camera and upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court or that such victim or witness is unavailable as defined in 90.804(1), the trial court may order that the testimony of a child under the age of 16 who is a victim of or a witness to an unlawful act, contact, intrusion, penetration, or other sexual offense may be taken outside of the courtroom and shown by means of closed circuit television.
>
> (2) The motion may be filed by the victim or witness; the attorney, parent, legal guardian, or guardian ad litem of the victim or witness; the prosecutor; the defendant or the defendant's counsel; or the trial judge on his own motion.
>
> (3) Only the judge, the prosecutor, the defendant, the attorney for the defendant, the operators of the videotape equipment, an interpreter, and some other person who, in the opinion of the court, contributes to the well-being of the child and who

will not be a witness in the case may be in the room during the recording of the testimony.

(4) During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.

(5) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

STATEMENT OF THE CASE

In April 1987, Janice Thomas, a District Intake Counselor with HRS received a report of possible sexual abuse against Cumbie's stepdaughter, five-year-old Cathy Williford. Someone at a Head Start Center had reported the possible abuse, and in response to this report, Ms. Thomas went to the Center and talked with Cathy. The girl told Ms. Thomas that her daddy, Kenneth Cumbie, had played sexual games with her. He had put his mouth on her vagina, and she had put her mouth on his penis, and he had ejaculated in her mouth. He had also showed her "nasty books" with pictures of naked people in them.

Later, Dr. Harsch, a pediatrician and Child Protection Team physician, examined Cathy. During the course of his examination, Cathy repeated most of what she had told Ms. Thomas, and she showed what had occurred using anatomically correct dolls. She had also used the dolls with Ms.

Thomas. Dr. Harsch examined Cathy's vaginal opening which was larger than normal. The hymen, which is normally intact for girls of that age, was wider than it should have been.

An amended information was filed in the circuit court for Washington County, Florida, on August 27, 1987, charging Kenneth Cumbie with capital sexual battery. Before trial, the State filed two pleadings relevant to this Petition, a Motion for Protective Order seeking to exclude Cumbie from being present at his stepdaughter's deposition, which was granted, and Notice of Intent to Rely on Out-of-Court Statement pursuant to Fla. Stat. § 90.803(23). The State sought to introduce the child victim's statements regarding what Cumbie had done to her via the testimony of the counselor and physician. With some restrictions, the trial court allowed this testimony.

Cumbie proceeded to jury trial on September 23, 1987. At trial, pursuant to the State's request, the trial court allowed the child victim to testify via closed circuit television outside of Cumbie's presence pursuant to Fla. Stat. § 92.54 (1987). Cumbie never objected to this procedure. Cumbie testified at trial and was convicted of attempted capital sexual battery. A motion for new trial was denied and Cumbie was sentenced to twenty years in prison followed by twelve years probation.

On appeal, Respondent raised, inter alia, a claim pursuant to *Coy v. Iowa,* 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), and Petitioner argued that this claim was procedurally barred. The First District Court of Appeal affirmed Cumbie's conviction, remanded on a sentencing issue, and held that "[w]e find no merit to the remaining issues." *Cumbie v. State,* 539 So. 2d 538 (Fla. 1st DCA 1989). [A-51].

Cumbie subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle

District of Florida, which was transferred to the Northern District of Florida pursuant to motion by the State.

The federal magistrate issued a report and recommendation finding the unconstitutional denial of face-to-face confrontation harmless beyond a reasonable doubt and recommending that the petition for writ of habeas corpus be denied. [A-21-50].

On March 10, 1992, the Chief Judge of the Northern District issued an order adopting the report and recommendation and denying Cumbie's petition for writ of habeas corpus.

Cumbie appealed to the United States Court of Appeals for the Eleventh Circuit and the court remanded the case to the district court with instructions to grant the writ of habeas corpus, finding that Respondent was denied his right to confrontation at trial, that procedural bar did not apply, and that the error was not harmless. [A-1-20].

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DECIDE WHETHER *COY V. IOWA*, 487 U.S. 1021 (1988), WAS MISAPPLIED ON THE MERITS TO GRANT HABEAS RELIEF IN THIS CASE WHERE RESPONDENT'S CONFRONTATION CLAUSE CLAIM WAS PROCEDURALLY BARRED AND ANY CONFRONTATION CLAUSE ERROR WAS HARMLESS

The facts of this case and the caselaw of this Court applicable thereto lead to the inescapable conclusion that the Eleventh Circuit Court of Appeals misapplied *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), in granting relief to the Respondent.

This Court should take the opportunity to clarify the Court of Appeals' erroneous application of the procedural default doctrine in this case as it violates this Court's pronouncements regarding comity and federalism and undermines the State's interest in enforcing its own procedures.

Finally, this Court should review the Court of Appeals' erroneous application of the harmless error doctrine as set forth in this Court's recent decision in *Brecht v. Abrahamson*, 507 U.S. ___, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

I. The Court of Appeals' Decision Erroneously Applies the Procedural Default Doctrine.

Respondent was convicted of attempted sexual battery upon his five-year-old stepdaughter. The evidence presented at trial through the victim's admissible hearsay statements and her closed circuit television testimony showed Respondent's guilt beyond a reasonable doubt. The victim was permitted to testify via closed circuit television pursuant to Section 92.54, Florida Statutes (1987).

At the in camera hearing held pursuant to Section 92.54(1), Florida Statutes, mental health counselor Cheryl Stevens testified that the child would suffer at least moderate emotional trauma or harm if required to testify in open court. The trial court agreed and found that there was a likelihood that the child would suffer at least moderate emotional or mental harm from testifying in open court, pursuant to the specific requirements for findings of fact of Section 92.54(5), Florida Statutes.

There has never been any dispute as to the facts of this case, and Respondent failed to argue in the state courts that the above-described proceeding did not comport with the requirements of Florida law.

Petitioner argued in the state appellate court that the procedure in this case was proper under *Coy v. Iowa,* but Petitioner's primary argument was that

> A review of the record reveals that the defense never objected to the admission of closed-circuit testimony, consequently, the issue was not preserved for appellate review and the judgment must be affirmed. A defendant fails to preserve an issue for appeal by failing to object at trial. *Sims v. State,* 444 So. 2d 922 (Fla. 1983); *Jones v. State,*

449 So. 2d 253 (Fla. 1984); *Jackson v. State,* 451 So. 2d 458 (Fla. 1984). Constitutional error is not necessarily fundamental error and even constitutional rights can be waived if not timely presented. *Ray v. State,* 403 So. 2d 956 (Fla. 1981).

Although Respondent attempted to raise the issue on appeal, the State asserted the claim was not preserved and as such should be summarily denied. The Florida appellate court remanded on a sentencing issue, and as to the remaining issues, found "no merit." [A-51].

Petitioner reiterated the argument that the issue was unpreserved in Petitioner's January 25, 1990, Response filed in the Northern District of Florida:

> It is important to note that in *Coy,* the "[a]ppellant objected strenuously to use of the screen..." (*Coy,* supra at 863), thereby preserving the issue for review; whereas here Petitioner raised no such objection.[2]

The federal magistrate below noted the preservation argument but made no finding thereon. [A-49] The Confrontation Clause issue is thus procedurally barred from consideration due to the absence of a contemporaneous objection on constitutional grounds. *See Sochor v. Florida,* 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992); *Hopkins v. State,* 608 So. 2d 33 (Fla. 1st DCA 1992); *Jones v. State,* 582 So. 2d 110 (Fla. 3d DCA 1991); *Russell v. State,* 572 So. 2d 940 (Fla. 5th DCA 1990); and *Stone v. State,* 547 So. 2d 657 (Fla. 2d DCA 1989).

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2 Although the Court of Appeals below suggests that the State waived the preservation argument, that argument goes to the court's jurisdiction, and therefore cannot be waived. *Sochor v. Florida,* 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).

Federal courts must respect state contemporaneous objection rules. In *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), this Court stated:

> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition.
>
> * * *
>
> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state courts as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and the place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

> We believe the adoption of the Francis[3] rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceeding. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitution right there is every reason for his following state procedure in making known his objection.

Id. at 53 L. Ed. 2d 609, 610. *See also Coleman v. Thompson,* 501 U.S. ___, 111 S. Ct. ___, 1115 L. Ed. 2d 5640 (1991); *Stone v. Powell,* 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

Not only did defense counsel fail to object at trial, counsel offered no argument whatsoever at the motion hearing when asked to do so. *No argument or objection based on the federal constitution was ever made by Respondent at or before trial.* The issue was thus waived for further review.

Florida strictly applies its procedural default doctrine based on the contemporaneous objection rule, and pursuant to the rule announced by the Florida Supreme Court, it would be error for a Florida appellate court to disregard the rule. *See Tillman v. State,* 471 So. 2d 32, 35 (Fla. 1985); and

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3 *Francis v. Henderson,* 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976).

Dugger v. Adams, 489 U.S. 401, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989).

As this Court noted in a previous Florida case, *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977):

> £If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

439 U.S. at 89.

In holding that the confrontation clause issue was preserved for review, the Eleventh Circuit Court of Appeals is in conflict with the First Circuit Court of Appeals. In *Tart v. Commonwealth of Massachusetts,* 949 F.2d 490 (1st Cir. 1991), the court held that a state appellate court's cursory review of an issue which was not preserved by contemporaneous objection at trial does not waive that State's independent contemporaneous objection bar, stating:

> Having concluded that Tart's entire habeas petition was not barred for failure to exhaust state remedies, we turn to consider whether his first habeas claim, based on the above-referenced jury instruction was properly dismissed. The district

court concluded, *inter alia,* that Tart's failure to assert a contemporaneous challenge to the jury instruction, and the SJC's decision not to waive the procedural default, constituted an independent state law ground for the SJC's refusal to grant relief, thus precluding district court consideration of any federal basis for the same claim. *See Wainwright v. Sykes,* 433 U.S. 72, 86-87, 93 S. Ct. 2497, 2506, 53 L. Ed. 2d 594 (1977). Tart contends that the Massachusetts contemporaneous objection rule was waived when the SJC implicitly concluded that its refusal to provide relief from the state procedural default would not constitute a "miscarriage of justice" under federal constitutional principles.

The mere fact that a state appellate court engages in a discretionary, and necessarily cursory, review under a "miscarriage of justice" analysis does not in itself indicate that the court has determined to waive an independent state procedural ground for affirming the conviction. *See Puleio v. Vose,* 830 F.2d 1197, 1200 (1st Cir. 1987); *McCown v. Callahan,* 726 F.2d 1, 3 (1st Cir. 1984). We will not infer waiver of a contemporaneous objection rule unless the state appellate court has made it "reasonably clear that its reasons for affirming a conviction rest upon its view of federal law." *See Doucette v. Vose,* 842 F.2d 538, 540 (1st Cir. 1988). For reasons of comity and in recognition of the important state interests served by state procedural rules, where the state court has grounded its disposition of the claim on a state procedural rule violation, the petitioner cannot present the claim to us absent a showing of "cause" for noncompliance with the state rule, as well as actual prejudice. *See Wainwright,* 433 U.S. at 86-87, 97

> S. Ct. at 2506; *Carsetti v. State of Maine,* 932 F.2d 1007, 1009 (1st Cir. 1991). A mere assertion of attorney inadvertence normally does not constitute sufficient "cause" to excuse a state procedural default. *See Palmariello v. Superintendent of M.C.I. Norfolk,* 873 F.2d 491, 493 (1st Cir. 1989).

949 F.2d at 496.

Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989), relied on by the Court of Appeals below, presented a much different situation than that at bar. In *Harris,* this Court noted:

> In its order, the Appellate Court referred to the "well-settled" principle of Illinois law that "those [issues] which could have been presented [on direct appeal], but were not, are considered waived." Id., at 12. The court found that, "except for the alibi witnesses," petitioner's ineffective-assistance allegations "could have been raised in [his] direct appeal." Ibid. The court, however, went on to consider and reject petitioner's ineffective-assistance claim on its merits.

103 L. Ed. 2d at 314. In contrast, the Florida appellate court did *not* address Cumbie's confrontation claim, on its merits or otherwise. Because the State primarily argued procedural bar on direct appeal, the only logical conclusion is that the court rejected review on that basis (*Coleman v. Thompson, supra*). *Harris* is thus distinguishable from the instant case and the "plain statement" rule does not apply here because the Florida court, unlike the Illinois court in *Harris,* did not waive the procedural bar by specifically addressing the issue raised. Comity and federalism prohibit the federal courts from addressing Cumbie's confrontation clause argument.

There is no "reasoned opinion" in state court concerning Respondent's confrontation clause claim. As in *Ylst v. Nunnemaker,* 501 U.S. ___, 111 S. Ct. ___, 115 L. Ed. 2d 706 (1991), "Respondent has adduced nothing to show that any (state) court actually reached the merits of his federal claim." 111 L. Ed. 2d at 718. Respondent has not overcome the presumption that the state courts' last unexplained order did not reach the merits. *Id.* Federal court review of the confrontation clause claim is therefore barred unless Respondent can establish "cause and prejudice" for the default. *See Murray v. Carrier,* 477 U.S. 493, 495-6, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

The "no merit" ruling by the appellate court is the equivalent of a per curiam affirmance for purposes of further review in state court. As the Eleventh Circuit previously stated in *Harmon v. Barton,* 894 F.2d 1288 (11th Cir. 1990)

> The "plain statement" rule, it should be emphasized, applies only when an ambiguity exists in the state court disposition. A per curiam affirmance decision "does not create ambiguity to an otherwise ambiguous situation, just as it does not clarify ambiguity that exists based on the decision below." *Rease v. State,* No. 88-3754 (M.D. Fla. Aug. 25, 1989). Stated differently, the plain statement rule should not be applied to create ambiguity where one did not exist simply because the appellate court, by its per curiam affirmance, elected not to restate an unambiguous lower court ruling. We conclude that the court's per curiam affirmance of the lower court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts.

Harmon, supra at 1273.

In *Campbell v. Wainwright,* 738 F.2d 1573 (11th Cir. 1984), cited by the Court of Appeals below, the court specifically adopted the reasoning of the Court of Appeals for the Second Circuit in *Martinez v. Harris,* 675 F.2d 51 (2d Cir. 1982), *cert. denied.* 459 U.S. 849, 103 S. Ct. 109, 74 L. Ed. 2d 97 (1982), stating:

> In *Martinez,* the court noted that several situations can arise in which it is difficult to decide whether the state court reached the merits when it rendered its decision without opinion. The state's attorney may have briefed only the procedural default issue; he may have briefed only the merits; or he may have briefed both issues. The *Martinez* court concluded that *only in the second situation — when the state's attorney briefs only the merits — should the federal court also reach the merits. Id.* at 54. To hold otherwise would place the state's attorney in the unreasonable position of choosing whether to argue the merits in the alternative when briefing the case in state courts. *Id.* We agree with the *Martinez* court's resolution of the issue. The petitioner — who has failed properly to preserve the point of error — should sustain the burden of showing that the state has created in his case an exception to the established rule and reached the merits. The *Martinez* rule clearly leads to the conclusion that Campbell is barred now from asserting issue I unless he can demonstrate cause and prejudice.

Campbell, supra at 1578 (emphasis supplied).

As stated above, Petitioner in the state appellate court argued procedural default, and Respondent had the burden of showing that the state court made an exception to the established rule in his case and reached the merits. Under

the Eleventh Circuit's own conclusion in *Campbell* and *Martinez, supra,* and this Court's decisions in *Sykes* and *Coleman,* Respondent was barred from asserting his claim in federal court. As such, Respondent was entitled to no relief.

II. The Court of Appeals' Decision Erroneously Applied the Harmless Error Doctrine.

In *Coy v. Iowa,* this Court held that

> We have recognized that other types of violations of the Confrontation Clause are subject to that harmless error analysis, see e.g., Delaware v. Van Arsdall, 475 U.S. at 679, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674, and see no reason why denial of face-to-face confrontation should not be treated the same. An assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence.

Coy, 487 U.S. at 1021, 1022.

While properly recognizing that pursuant to *Coy v. Iowa, supra,* the lack of face-to-face confrontation is subject to a harmless error analysis, the Court below held that pursuant to the standard set forth in *Brecht v. Abrahamson,* 507 U.S. ___, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), the district court erred in finding the error in this case harmless. The Court of Appeals misapplied *Brecht.*

The Court held that the district court erred in applying the harmless error analysis from *Delaware v. Van Arsdall,*

475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), which was based on *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)(*Van Arsdall,* 89 L. Ed. 2d at 686). Instead, the Court held under the *Brecht* standard, announced after oral argument in this case, that the harmless error conclusion of the district court under *Delaware v. Van Arsdall, supra,* was wrong, concluding that under a *Brecht* analysis Respondent had suffered substantial and injurious effect or influence as a result of Cathy's testimony. In fact, such a conclusion violated *Coy* because the court in *Coy* looked to the remaining evidence to determine harmless error *not* to the testimony of the victim, "harmlessness must therefore be determined on the basis of the remaining evidence." *Coy,* 487 U.S. at 1021, 1022. In *Brecht,* this Court stated:

> The imbalance of the costs and benefits of applying the Chapman harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The *Kotteakos*[4] standard, we believe fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776, 90 L. Ed. 2d 1557, 66 S. Ct. 1239. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United State v. Lane,* 474 U.S. 438, 449, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986). The *Kotteakos* standard is thus better tailored to the nature and purpose of

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4 *Kotteakos v. United States,* 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 2d 1557 (1946).

> collateral review, and more likely to promote the considerations underlying our recent habeas cases.

123 L. Ed. 2d at 373. The Court below applied a new standard which places a *greater* burden upon the habeas petitioner to show harmful error, and then proceeded to hold that because the lower court applied a standard more favorable to the habeas petitioner, it erred in finding harmless error. It defies logic to hold that harmless error under a relaxed standard[5] of review becomes harmful error under a stricter standard.[6]

III. The Court of Appeals' Decision Erroneously Applies *Coy v. Iowa* to Grant Respondent Relief.

The Court of Appeals below determined that the findings of the trial court in this case were insufficient to permit the five-year-old sexual battery victim to testify outside the court room via closed circuit television even though the defendant did not object or otherwise indicate any opposition to this procedure,[7] holding that

> Justice O'Connor's reference to section 92.54 in *Coy* was undoubtedly premised on an assumption

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5 "[R]easonable possibility that trial error contributed to verdict. *Chapman, supra.*

6 "[S]ubstantial and injurious effect in determining verdict." *Brecht, supra.*

7 It should be noted that *Coy v. Iowa, supra,* had not been decided at the time of trial, and that *Maryland v. Craig,* 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), was decided after Respondent's conviction became final, and thus *Craig* cannot be applied retroactively to this case. *Hardy v. Wigginton,* 922 F.2d 294 (6th Cir. 1990).

> that the trial court's inquiry would comply with the requirements of subsection 92.54(5), that the court "make specific findings of fact, on the record, as to the basis for its ruling under this section," Such an analysis, if actually conducted by the state court, could rise to the level of a "case-specific finding of necessity" that Justice O'Connor believed necessary to overcome the defendant's constitutional rights. *Coy,* 487 U.S. at 1025, 108 S. Ct. at 2805 (O'Connor, J., concurring). We do not consider the state trial court's mere recitation of the statutory language in this case to comply with the dictates of section 92.54(5). Even if, as a matter of state law, the trial court's hearing and finding were sufficient to fulfill the requirements of the statute, the procedure did not in this case adhere to the constitution. *Cf. Penry v. Lynaugh,* 492 U.S. at 318, 109 S. Ct. at 2946.

991 F.2d at 723 (footnote omitted).

It is important to note that § 92.54, Fla. Stat. (1987), did not require a finding that the child would suffer trauma from testifying in the presence of the defendant. Moreover, Respondent never challenged the constitutionality of the statute, either facially or as applied. Nevertheless, the Eleventh Circuit's decision was based on an application of *Maryland v. Craig, supra,* to the facts of this case. The magistrate's report and recommendation reached a similar result. Although maintaining that the decision was based on *Coy v. Iowa,* a careful reading of the opinion demonstrates that the decision was impermissibly influenced by this Court's decision in *Craig*:

> The state's "Motion for Use of Closed Circuit Television" did not mention the necessity, nor even request, that Cathy testify outside the presence of

> the defendant. (R 89, p. 45)[8] There was no discussion whatsoever during the brief hearing on the state's motion about whether there would be a danger of significant traumatization to Cathy if Cumbie stayed in the courtroom during her testimony. Cathy's counselor did not mention anything about Cathy's feeling toward Cumbie or whether Cumbie's presence in the room with Cathy might make it more or less likely that she would become upset or suffer trauma.
>
> * * *
>
> We simply cannot find any support in the record for the proposition that the state demonstrated, or the trial court properly articulated, any reason to justify Cathy's separation from the defendant during her testimony. There is nothing to indicate that she was afraid of Cumbie or that testifying by closed circuit television would enhance the protection she needed.

991 F.2d at 722. Although claiming to not apply *Craig,* the Court of Appeals impermissibly considered and applied the precepts of *Craig* retroactively to this case, as did the magistrate below. Indeed, the retroactive application of *Craig* was the main issue before the Court of Appeals and was the feature of oral argument in this case. Although the opinion is "silent" as to this point, it is clear based on the opinion that the Court retroactively applied *Craig* to this case.

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8 As § 92.54(4), Florida Statutes (1987), permitted the child's testimony to be taken outside of the defendant's presence, Respondent had sufficient statutory notice of this procedure.

CONCLUSION

Fifty-nine years ago, Justice Cardozo said: "[J]ustice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934). In *Cumbie v. Singletary,* the Court of Appeals has struck an unacceptable balance between a defendant's constitutional right to face-to-face confrontation and the compelling governmental interests in safeguarding the physical and psychological well being of child victims of sexual battery. By correcting the *Cumbie* court's errors, this Court will right the balance and clarify its views on the above subjects.

For these reasons, Petitioner requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

BRADLEY R. BISCHOFF
Assistant Attorney General
Florida Bar Number 0714224

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

Case No. _____

In The

Supreme Court of the United States

October Term 1993

HARRY K. SINGLETARY,

Petitioner,

v.

KENNETH CUMBIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION

ROBERT A. BUTTERWORTH
Attorney General

BRADLEY R. BISCHOFF
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-10500
(904) 488-0600

COUNSEL FOR PETITIONER

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Kenneth CUMBIE, Petitioner-Appellant,

v.

Harry K. SINGLETARY, Respondent-Appellee.

No. 92-2506

United States Court of Appeals
Eleventh Circuit

May 26, 1993

David A. Davis, Tallahassee, FL, for petitioner-appellant.

Edward C. Hill, Bradley R. Bischoff, Asst. Attys. Gen., Dept. of Legal Affairs, Tallahassee, FL, for respondent-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before COX, Circuit Judge, MORGAN and HENDERSON, Senior Circuit Judges.

HENDERSON, Senior Circuit Judge:

Kenneth Cumbie was convicted in 1987 in Florida circuit court of attempting to sexually assault his five year old step-daughter, Cathy. During the trial Cathy testified via one-way closed circuit television outside Cumbie's presence. The principal issue in this appeal from the denial of his petition for habeas corpus relief by the United States District Court for the Northern District of Florida is whether Cumbie is entitled to the grant of the writ for violation of his Sixth Amendment right of face-to-face confrontation.

I. BACKGROUND

Cumbie was tried in Washington County, Florida, on a charge of capital sexual battery. Before the trial in September 1987, the prosecutor moved to have Cathy testify from outside the courtroom with the use of closed circuit television.[1] The court held a brief evidentiary hearing on the motion during which a mental health counselor who had worked with the child was a witness. The counselor spoke generally about Cathy's personality and reaction to her alleged abuse and the events that followed. (Tr. 81-84) When asked if she thought that Cathy would suffer at least moderate emotional trauma or harm if required to testify in open court — the approximate language of Fla.Stat. § 92.54(1)(1987)[2] — the counselor

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1 The state's "Motion for Use of Closed Circuit Television" did not mention the need for Cathy to testify outside the presence of the defendant. (R 8, p. 45)

2 Fla.Stat. § 92.54 (1987) provides:

> (1) Upon motion and hearing in camera and upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court or that such victim or witness is unavailable as defined in s. 90.804(1), the trial court may order that the testimony of a child under the age of 16 who is a victim of or witness to an unlawful sexual act, contact, intrusion, penetration, or other sexual offense be taken outside of the courtroom and shown by means of closed circuit television.
>
> (2) The motion may be filed by the victim or witness; the attorney, parent, legal guardian, or guardian ad litem of the victim or witness; the prosecutor; the defendant or defendant's counsel; or the trial judge on his own motion.
>
> (3) Only the judge, the prosecutor, the defendant, the attorney for the defendant, the operators of the videotape equipment, an interpreter, and some other person who, in the opinion of the court, contributes to the well-being of the child and who will not be a witness in this case may be in the room during the recording of the testimony.

answered in the affirmative. No other evidence was presented.[3]

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(4) During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.

(5) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

3 The pertinent parts of the counselor's testimony were:

[Direct examination]

Q. Would you relate to the Court, please, what your observations of Cathy as to her appearance, her maturity level....

A. [...] The second time I saw her she came in and said uh...she felt real sad and tired because people kept asking her questions about her daddy and she said that she was just tired of answering questions.

[...]

Q. Have you been able to determine from talking to her, how she feels about what has occurred between them?

A. The impression I have is that initially she didn't really think...didn't really think it was anything that was bad which is very common for most young children but then as they began to talk about it and having to answer so many different people the more people involved the more worst she began to feel about it. She seemed to be...emotionally appeared to be more upsetting to her, the more she talked about it in Court, how she felt about that and she said that she knew that she may have to talk about it and I asked her if she could do that, if she could go to the Courtroom and talk about it in front of people and she would just sit in her chair there at Head Start shaking her head and saying no...no...and I think at that point she really...I don't think it was something that she could do.

[...]

Q. Based on your training that you have received and based on your experience and based on the interviews you have had with Cathy, do you feel that if she were required to testify in open Court, that she would suffer at least moderate emotional trauma or harm.

A. Yes, I do.

[...]

The state trial court's entire findings of fact were:

> Well, I will allow the child to testify by closed circuit TV because I find that there is a likelihood that she would suffer at least moderate emotional or mental harm from testifying in open court.

(Tr. 86) There is no reference in the record to the necessity or propriety of keeping Cumbie from the room in which Cathy testified, or the harm that would be avoided by allowing Cathy to testify in that manner. As stated earlier, neither did the state's motion seek Cumbie's exclusion or claim that Cathy would be traumatized by Cumbie's presence in the room with her. (R. 8, p. 45) Cumbie did not object to the state trial court's ruling.

During the trial the counselor and a physician both revealed what Cathy had purportedly told them about her sexual contact with Cumbie. The physician also testified that an examination of Cathy's vagina revealed she had been sexually abused, but he could not identify Cumbie as the source of that abuse. During her testimony, Cathy testified about her abuse by Cumbie and told of sexual contact she had with her nine year old brother and fourteen year old male cousin. The counselor and physician also mentioned the encounter with Cathy's brother on cross-examination.

The jury convicted Cumbie of the lesser included offense of attempted capital sexual battery. On direct appeal, the

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[Cross-examination]

[...]

Q. Did you talk to her about testifying in front of a TV camera?

A. No sir, I didn't talk to her about testifying in front of the TV camera.

Q. You haven't asked her about how she is feeling about that?

A. No sir.

(Tr 81-85(copied exactly from trial transcript without "sic" notations)(all ellipses are in original transcript unless bracketed).

Florida First District Court of Appeal affirmed Cumbie's conviction but remanded for resentencing. *Cumbie v. State,* 539 So. 2d 538 (Fla. 1st DCA 1989). The court discussed only the merits of the sentencing issue and stated, "We find no merit to the remaining issues." *Id.* The court did not specifically address or mention Cumbie's claim on appeal that the procedure by which Cathy testified violated his right of confrontation guaranteed by the Sixth Amendment as explained in *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct 2798, 101 L.Ed.2d 857 (1988).

Cumbie then filed this petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, urging, as he did on direct appeal, that his right to confront adverse witnesses was infringed when Cathy was permitted to testify by way of one-way closed circuit television outside his presence. The case was transferred to the Northern District of Florida and referred to a magistrate for a report and recommendation.

While the case was pending before the magistrate the Supreme Court of the United States published its opinion in *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct 3157, 111 L.Ed.2d 666 (1990), in which the Court detailed the necessary findings which must be made before a child sexual abuse victim may be allowed to testify outside the presence of the defendant. The magistrate requested the parties to address the impact of *Craig* on this case. Cumbie argued that *Craig* clearly demonstrated that he was deprived of his rights under the Confrontation Clause because the state trial court did not comply with the dictates of *Craig.* The respondents maintained that Cumbie was not entitled to the benefit of *Craig* because it was announced after his conviction became final and stated a new rule of law not available to him retroactively, as established in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct 1060, 103 L.Ed.2d 334 (1989, and its progeny.

The magistrate concluded that 1) *Craig* did not state a new rule of law, so Cumbie was entitled to its protections retroactively; 2) the state trial court erred because it did not make adequate findings of fact to overcome Cumbie's right to face-to-face confrontation as required by *Craig;* 3) even if *Craig* stated a new rule and could not be applied retroactively to Cumbie's case, the trial court's findings still did not satisfy the dictates of *Coy v. Iowa,* which was decided after Cumbie's trial but before his conviction became final; and 4) even though the state trial court committed constitutional error, Cumbie was not entitled to relief because the error was harmless. Both parties filed objections to the magistrate's report and recommendation but it was approved and adopted by the district court, denying relief. This appeal followed.

II. ISSUES

Cumbie faults the district court's ultimate decision that the constitutional error committed by the state trial court was harmless. The state[4] contends that Cumbie's constitutional claim is barred by the procedural default doctrine because he did not timely object during trial. The state also insists that the district court erred when it held 1) that *Craig* applied retroactively to Cumbie's case and 2) that the state trial court's procedure violated *Coy.*

We address the procedural default issue and the application of *Coy* to the facts of this case. However, since we find constitutional error, we need not reach the question of *Craig's* retroactivity. Finally, we direct our attention to the harmless error analysis.

---

4 For simplicity, Respondent Harry K. Singletary will be referred to as the "state" hereafter.

III. STANDARD OF REVIEW

We review the magistrate's federal findings as adopted by the district court for clear error and conclusion of law *de novo. See Gates v. Zant,* 863 F.2d 1492 (11th Cir. 1989); *LoConte v. Dugger,* 847 F.2d 745 (11th Cir. 1988).

IV. DISCUSSION

A. Procedural Default

The magistrate did not consider the procedural default issue. Although the state strenuously urges on appeal that Cumbie's claim is barred by this doctrine, the most that can be said about its position in the district court was that it teasingly hinted at this argument. The state asserts that it properly called the issue to the attention of the court and thus preserved if for appeal by including the following paragraph in its discussion of *Coy v. Iowa*:

> It is important to note that in *Coy,* the "(a)ppellant objected strenuously to the use of the screen..." (Coy, supra at 863), thereby preserving the issue for review, whereas here Petitioner raised no such objection.

(R. 1, Resp.'s Br. in Response to Dec. 18, 1989 Order to Show Cause p. 6) While we are skeptical that this paragraph was even intended to raise the procedural default question, we need not determine whether the reference is sufficient to preserve it for appeal because the defense would fail on its merits.

In *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct 2497, 53 L.Ed.2d 594 (1977), the Supreme Court formulated the doctrine of procedural default in the context of habeas corpus. If a state defendant fails to advance an argument in state court, or attempts to assert it in an improper manner, and state procedural rules preclude the state courts from

entertaining its merits for adequate state law reasons, then the federal habeas corpus court is also precluded from hearing the merits of that claim absent a showing of cause and prejudice. However, even when a defendant fails to object at trial, the federal habeas corpus court will consider a constitutional issue if the defendant suggests it on direct appeal and the state appellate court does not expressly reject it on adequate and independent state law grounds. *Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct 1038, 1043, 103 L.Ed.2d 308 (1989).

Cumbie did not object to the trial court's order permitting Cathy to testify by closed circuit television transmission or to his remaining in the courtroom while she testified from the outside, but did claim on direct appeal that the procedure violated his Sixth Amendment Confrontation Clause rights as articulated in *Coy v. Iowa.* The state responded, urging that the Confrontation Clause argument should not be considered on appeal because Cumbie waived it by failing to make it at the trial level. (Answer Br., Ex. A, p. 6)

On direct appeal, the Florida First District Court of Appeal only dealt with the point raised by Cumbie relating to his sentencing. It did not specifically address the Confrontation Clause question but simply wrote "We find no merit to the remaining issues." *Cumbie v. State,* 539 So. 2d 538 (Fla. 1st DCA 1989). The court apparently considered the merits of the confrontation problem since it did not state specifically that it refused to consider the issue because of state procedural grounds. Therefore, we are bound by precedent to hold that the state court did not rely on its own procedural default rule and must speak to the merits of the claim in the federal habeas proceeding. *See Harris v. Reed,* 489 U.S. at 263, 109 S.Ct at 1043; *Campbell v. Wainwright,* 738 F.2d 1573, 1576-77 (11th Cir. 1984). Accordingly, even if we assume the state properly raised the procedural default

defense in the district court, it would not avoid the necessity of our consideration of the confrontation clause.

B. Sixth Amendment Claim

The Sixth Amendment to the federal constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." In *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct 2798, 101 L.Ed.2d 857 (1988), the Court held that the "irreducible literal meaning" of this clause guaranteed a defendant face-to-face confrontation with his accusers, even in child abuse cases. Coy was decided while Cumbie's conviction was on direct appeal and thus affects his case.[5] *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct 708, 716, 93 L.Ed.2d 649 (1987).

1. Coy v. Iowa

In *Coy,* the Supreme Court had for consideration the constitutionality of a state trial procedure designed to protect child witnesses who testify in sexual abuse cases. Pursuant to an Iowa statute, the trial court placed a screen between the defendant and the accusing child abuse victim/witnesses, based on a statutory presumption that the screen was necessary to protect the children from the traumatic effect of testifying in court. After certain lighting adjustments were made in the courtroom, the large screen blocked the defendant from the witnesses' view, but allowed the defendant to dimly observe the witnesses. The Court found that this procedure violated the defendant's Sixth Amendment right to face-to-face confrontation.

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5 Cumbie's direct appeal was decided March 7, 1989. *Cumbie v. State,* 539 So. 2d 538 (Fla. 1st DCA 19989). *Coy* was published on June 29, 1988.

Justice Scalia, writing for the Court,[6] emphasized the "irreducible literal meaning" of the Sixth Amendment, which " '[s]imply as a matter of English'...confers at least 'a right to meet face to face all those who appear and give evidence at trial.' " *Coy,* 487 U.S. at 1021, 1016, 108 S.Ct at 2803, 2800 (quoting *California v. Green,* 399 U.S. 149, 175, 90 S.Ct 1930, 1944, 26 L.Ed.2d 489 (1970)(Harlan, J., concurring)). The Court concluded that the screen employed by the Iowa court violated Coy's right to face-to-face confrontation. It noted that the screen "was specifically designed to enable the complaining witness to avoid viewing the appellant as they gave their testimony," *Id.* 487 U.S. at 1020, 108 S.Ct at 2803, and that "[[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.* To the extent any exceptions to a defendant's literal right to confront the witnesses might be available, the generalized legislative presumption of harm that authorized the screen in this case did not create such an exception. *Id.* at 1021, 108 S.Ct 2803.

Justice O'Connor wrote a concurring opinion in *Coy,* in which Justice White joined. She agreed with the Court that the Iowa legislative presumption of harm was not sufficient to defeat the defendant's right to an in-person encounter with a witness, but wrote that states may still take steps to protect child witnesses. To the extent that a trial court "makes a case-specific finding of necessity,...the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* at 1025, 108 S.Ct at 2805. Justice O'Connor cited the Florida statute at

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6 Justice Scalia wrote the majority opinion in which Justices Brennan, White, Marshall, Stevens and O'Connor joined. Justice O' Connor wrote a concurring opinion in which Justice White joined, and Justice Blackmun, joined by the Chief Justice, dissented. Justice Kennedy did not participate in the decision.

issue in this case as an example of a state statute that required such findings. *Id.*

2. Applying ***Coy***

A plain reading of Fla.Stat. § 92.54 (1987) reveals a two-part legislative scheme. First, subsections (1) through (3) provide that a child victim or witness may testify outside the courtroom by closed circuit television, if after a hearing, the court makes a "finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court" or that the child is unavailable. Fla.Stat. § 92.54(1) (1987). This procedure contemplates that the defendant and child may be in the same room during the child's testimony. Fla.Stat. § 93.54(3) (1987).[7] Of course, when the defendant and the child witness are in the same room during the child's testimony, the defendant's right to face-to-face confrontation is not a concern. *See Coy,* 487 U.S. at 1023, 108 S.Ct at 2804 (O'Connor, J., concurring).

The second aspect of section 92.54 allows the court to require the defendant to stay in the courtroom and watch on television while the child testifies from another room.[8] There is no indication in the statute as to when the defendant must remain in the courtroom or what separate judicial findings are a necessary prerequisite to such action.

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7 Only the judge, the prosecutor, *the defendant,* the attorney for the defendant, the operators of the videotape equipment, an interpreter, and some other person who, in the opinion of the court, contributes to the well-being of the child and who will not be a witness in the case may be in the room during the recording of the testimony. Fla. Stat. § 92.54(3) (1987)(emphasis added).

8 *See* Fla. Stat. § 92.54(4) (1987), *supra* note 2.

Clearly, section 92.54(4) affects the defendant's confrontation rights. The procedure appears "specifically designed to enable the complaining witnesses to avoid viewing [the defendant] as they [give] their testimony." *Coy,* 487 U.S. at 1020, 108 S.Ct at 2802. When the defendant is forced to sit in a courtroom and watch a child testify against him via one-way closed circuit television, "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.*

The question, then, is whether the state trial court in this case made sufficient individualized findings about the possibility of harm to Cathy to reliably conclude that it was necessary for her to testify outside of Cumbie's presence and overcome the "irreducible literal meaning" of the Confrontation Clause. *Id.* at 1021, 1025, 108 S.Ct at 2803, 2805. Although four members of the *Coy* majority hinted that there might be no such exceptions to the right of personal confrontation, the two dissenters and two concurring justices believed such a showing could be made. It would have been reasonable for a Florida court after *Coy* to have held that sufficient individualized findings by the trial court could justify leaving Cumbie in the courtroom while Cathy testified from another room.

Several portions of the transcript and the record lead us to agree with the district court that the state court failed to make findings sufficient to defeat Cumbie's right to a face-to-face encounter as it was understood after *Coy.* No one at trial even appears to have considered Cumbie's Confrontation Clause rights. The state's "Motion for Use of Closed Circuit Television" did not mention the necessity, nor even request that Cathy testify outside the presence of the defendant. (R. 8, p. 45) There was no discussion whatsoever during the brief hearing on the state's motion about whether there would be a danger of significant traumatization to Cathy if Cumbie stayed in the courtroom during her testimony.

Cathy's counselor did not mention anything about Cathy's feelings toward Cumbie or whether Cumbie's presence in the room with Cathy might make it more or less likely that she would become upset or suffer trauma. *See Glendenning v. State,* 536 So. 2d 212 (Fla. 1988)(discussing adequacy of findings for applying analogous Fla.Stat. § 92.53, allowing videotaping of testimony of child witness, while defendant watched him from behind two-way mirror).

Even if we assume that a court after *Coy,* but before *Craig,* would not have known that the specific inquiry and findings necessary to overcome the defendant's right to face-to-face confrontation must actually be relevant to that right, we are still convinced that the trial court's inquiry and findings were constitutionally deficient in this instance.[9] Justice O'Connor wrote that a generalized legislative finding that child abuse witnesses need protection from testifying in the presence of the defendant is insufficient to prevail over the defendant's constitutional rights. However, "if a court makes a case-specific finding of necessity...the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Coy,* 487 U.S. at 1025, 108 S.Ct at 2805 (O'Connor, J., concurring). Clearly, some level of analysis that would at least lead to a "case-specific finding of necessity" was required after *Coy.*

We simply cannot find any support in the record for the proposition that the state demonstrated, or the trial court properly articulated, any reason to justify Cathy's separation from the defendant during her testimony. There is nothing to indicate that she was afraid of Cumbie or that testifying by closed circuit television would enhance the protection she needed. Rather, the inquiry in this case was little more than the legislative presumption of harm

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9 We recognize that the trial court did not have the benefit of *Coy* during Cumbie's trial.

rejected by this Court in *Coy*. The motion, hearing and findings in this case appear from the record to have been merely a rote exercise to conform with the formality of section 92.54, although we are not convinced the court's findings were even sufficient to satisfy the statute. To read the more relaxed standard of Justice O'Connor's concurrence in Coy and its requirement of a "case-specific finding of necessity," *Id.*, compels the conclusion that a mere recitation of the "magic words" is not enough to override the defendant's constitutional rights. *See Sochor v. Florida*, 504 U.S. ___, ___, 112 S.Ct 2114, 2123, 119 L.Ed.2d 326, 342 (1992)(O'Connor, J., concurring). There still must be a "close examination of 'competing interests' " that warrants subordinating the constitutional preference for face-to-face confrontation. *Coy*, 487 U.S. at 1024, 108 S.Ct at 2805. No such examination was conducted in this case.

It is true that Justice O'Connor specifically mentioned Fla.Stat. § 92.54(4) (1987) as a statute that might be adequate to satisfy constitutional scrutiny. Unfortunately, that dicta may have lulled some into a false sense of security. Most obviously, section 92.54(4), on its face, does not require any showing whatsoever to justify keeping the defendant in the courtroom while the child testifies by television from another room. Also, even if the statute did comply with Justice O'Connor's understanding of constitutional acceptability, the trial court must still sufficiently examine and apply the statute to protect the defendant's rights. A statute that is facially constitutional does not always guarantee that a particular defendant's rights are adequately protected by it. *See Penry v. Lynaugh*, 492 U.S. 302, 315, 109 S.Ct 2934, 2945, 106 L.Ed.2d 256 (1989). That is particularly true in this case, because the trial court's mere recitation of the operative statutory language does not strike us as the sort of "specific findings of fact, on the record, as to the basis for its ruling" contemplated by the statute. Fla.Stat. § 92.54(5) (1987).

Justice O'Connor's reference to section 92.54 in *Coy* was undoubtedly premised on an assumption that the trial court's inquiry would comply with the requirements of subsection 92.54(5), that the court "make specific findings of fact, on the record, as to the basis for its ruling under this section." Such an analysis, if actually conducted by the state trial court, could rise to the level of a "case-specific finding of necessity" that Justice O'Connor believed necessary to overcome the defendant's constitutional rights. *Coy,* 487 U.S. at 1025, 108 S.Ct at 2805 (O'Connor, J., concurring). We do not consider the state trial court's mere recitation of the statutory language in this case to comply with the dictates of section 92.54(5). Even if, as a matter of state law, the trial court's hearing and finding were sufficient to fulfill the requirements of the statute, the procedure did not in this case adhere to the constitution. *Cf. Penry v. Lynaugh,* 492 U.S. at 318, 109 S.Ct at 2946.[10]

3. Presumption of Correctness

Section 2254(d) of Title 28 mandates that a federal habeas corpus court presume the correctness of factual findings made by state courts. Once certain prerequisites are met, the federal court must defer to a state court's findings of

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10 *See Myles v. State,* 602 So. 2d 1278, 1281 (Fla. 1992) (specifically acknowledging that compliance with § 92.54 would not necessarily satisfy Maryland v. Craig and requiring Florida courts to conduct inquiries sufficient to conform to that precedent).

fact.[11] However, even if all these conditions are fulfilled, the presumption of correctness disappears if the state proceeding was deficient in one of eight enumerated ways. 28 U.S.C. § 2254(d)(1)-(d)(8); *Bundy v. Wainwright,* 808 F.2d at 1416.

Two such deficiencies are apparent from the record before us. First, subsection (d)(3) exempts from the presumption of correctness facts that were not adequately developed at the court hearing. Second, subsection (d)(8) excludes facts which are not fairly supported by the evidence. For the reasons discussed earlier, we do not believe that the state trial court's factual finding that Cathy would be harmed by testifying in court were sufficiently developed at the hearing or that it was fairly supported by the scant record. Therefore, that determination is not entitled to the presumption of correctness. *See Parker v. Dugger,* 498 U.S. 308, 321, 111 S.Ct 731, 739, 112 L.Ed.2d 812, 826 (1991). The record simply does not sustain the assertion that Cathy would have suffered such a degree of trauma as to make it necessary for her to testify outside Cumbie's presence, even under the lessened burden of the Coy concurrence.

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11 "There must have been...:

(a) a hearing on the merits of a factual issue,

(b) made by a state court of competent jurisdiction,

(c) in a proceeding to which the applicant and the state were parties,

(d) evidenced by a written finding, opinion, or other reliable and adequate written indicia."

Bundy v. Wainwright, 808 F.2d 1410, 1416 (11th Cir. 1987). The fourth requirement of written findings or indicia is satisfied if the habeas corpus court has a transcript of the relevant state proceeding. *Thompson v. Linn,* 583 F.2d 739, 742 (5th Cir. 1978).

C. Harmless Error

Having found that the state trial court procedure employed in this case did not comport to the constitutional standard mandated by *Coy,* we must next determine whether that omission is harmless to the extent that it would justify denial of relief to Cumbie. In *Coy,* the Court held that the lack of face-to-face confrontation is subject to a harmless error analysis. 487 U.S. at 1021, 108 S.Ct at 2803. The court cautioned, however, that "[a]n assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment, unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Id.* at 1021-22, 108 S.Ct at 2803-4.

After oral argument was heard in this appeal, the Supreme Court decided *Brecht v. Abrahamson,* ___ U.S. ___, 113 S.Ct 1710, 123 L.Ed.2d 353 (1993), in which it announced the harmless error rule applicable to federal habeas corpus cases alleging state court trial error. Because Cumbie complains of trial error in this habeas corpus proceeding, that is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless." *Arizona v. Fulminate,* ___ U.S. ___, ___, 111 S.Ct 1246, 1249, 113 L.Ed.2d 302, 303 (1991)(part II of opinion of Rehnquist, C.J., for a majority of the Court), we must look to *Brecht* for guidance in weighing the harmlessness of the constitutional error in this case.[12]

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12 We address this issue because we feel that the record is adequately developed and to remand the case to the district court for reconsideration in light of *Brecht* would be a waste of judicial time and resources.

Cumbie is entitled to federal habeas corpus relief only if the constitutional error from his trial " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht,* ___ U.S. at ___, 113 S.Ct at 1722 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct 1239, 1253, 90 L.Ed.2d 1557 (1946)). Bearing in mind the warning from Coy precluding speculation as to the effect on Cathy's testimony if Cumbie had been in the room during her testimony, the relevant inquiry is whether Cumbie can demonstrate that he was " 'actual[ly] prejudice[d]' " by Cathy's testimony. *Id.* (quoting *United States v. Lane,* 474 U.S. 438, 449, 106 S.Ct 725, 732, 88 L.Ed.2d 814 (1986)).

The district court did not employ this harmless error standard. Rather than considering whether Cathy's testimony had a substantial and injurious effect or influence in determining the jury's verdict the district court instead used the harmless error analysis from *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct 1431, 89 L.Ed.2d 674 (1986). That test is proper when a defendant's right to cross-examination is limited in violation of his Sixth Amendment confrontation rights. A reviewing court in such a case must evaluate the error for harmlessness by considering "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall,* 475 U.S. at 684, 106 S.Ct at 1438.[13]

The district court's application of the *Van Arsdall* test led it to find the error harmless. We disagree that such a

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13 We do not believe the *Van Arsdall* test was appropriate in this case, even before *Brecht. See Wasko v. Singletary,* 966 F.2d 1377, 1382-83 (11th Cir. 1992).

conclusion is warranted on the record before us under the newly articulated *Brecht* standard.

Particularly important to our review is the tragic evidence that Cathy had suffered abuse at the hands of her nine year old brother and fourteen year old cousin. Had that evidence not been before the jury, but only the evidence of Cumbie's alleged abuse, it would have been more reasonable to believe that the physical evidence of abuse and sexual experiences purportedly related to the testifying counselor and physician by Cathy pointed inexorably to Cumbie. However, that was not the case.

Even from the cold transcript before us, the victim's testimony is forceful and undoubtedly played a large role in the prosecution's case. Excising Cathy's testimony from the record, we cannot say that the jury would have convicted Cumbie based solely on the hearsay testimony and inconclusive physical evidence submitted by the state, particularly when those same state witnesses offered reasonable explanations and alternative sources for the physical evidence and the graphic information Cathy furnished them. Under these circumstances, we find Cumbie was actually prejudiced by Cathy's testimony and that her testimony substantially influenced the jury to convict him. *Brecht,* ___ U.S. at ___, 113 S.Ct at 1721-22.

V. CONCLUSION

We agree with the district court that the state trial court committed constitutional error based on the law as decided and in effect at the time Cumbie's conviction became final. However, considering the evidence, we must find that Cathy's testimony outside the presence of the defendant was a substantial factor in Cumbie's conviction. Consequently, we must reverse the district court's judgment that the constitutional error was harmless.

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and REMAND to the district court with instructions to grant the writ of habeas corpus unless the state affords Cumbie a new trial within a reasonable period of time.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

KENNETH CUMBIE,

Petitioner,

vs. MCA 90-50112-WEA

RICHARD L. DUGGER, et al.,

Respondents.

REPORT AND RECOMMENDATION

This matter is before the court upon a petition for writ of habeas corpus. Petitioner, who is represented by counsel in this action, was convicted in Washington County Circuit Court in September, 1987, of attempted capital sexual battery upon his five year old step-daughter and sentenced to twenty years incarceration followed by probation. The Florida First District Court of Appeals on March 7, 1989 affirmed petitioner's conviction (although the case was remanded for resentencing). In this federal habeas action, petitioner raises the single issue that his Sixth and Fourteenth Amendment confrontation rights were violated by the procedure utilized pursuant to Florida Statutes § 92.54[1]

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1 92.54 Use of closed circuit televisions in proceedings involving sexual offenses against victims under the age of 16.

(1) Upon motion and hearing in camera and upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court or that such victim or witness is unavailable as defined in § 90.804(1), the trial court may order that the testimony of a child under the age of 16 who is a victim of or a witness to an unlawful act, contact, intrusion, penetration, or other

by which the complaining child witness testified at trial outside of his presence by means of closed circuit television. The respondents concede that petitioner has exhausted his state remedies,[2] and thus this matter is ripe for review.

The undisputed events before the state court have been transcribed and are part of this record. Prior to trial, the state moved to have the child witness testify outside the presence of the defendant of the jury by means of contemporaneous closed circuit television. A brief evidentiary hearing followed during which a mental health counselor with the Holmes-Washington Guidance Clinic, who had previously counseled the child on approximately ten occasions, testified. She described the child as being

> very, very verbal, very talkative, very active, but very immature for most five year olds and doesn't respond well to direct questioning.

(doc. 8, T-81). She explained that

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sexual offense may be taken outside of the courtroom and shown by means of closed circuit television.

* * *

(4) During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.

(5) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

2 The confrontation issue raised in the immediate petition was argued on direct appeal. In an opinion published at 539 So. 2d 538 (1st D.C.A. 1989), the appellate court found, without discussion, no merit in petitioner's argument.

> [T]he second time I saw her she came in and said...she felt real sad and tired because people kept asking her questions about her daddy and she said she was just tired of answering questions...

(doc. 8, T-81). The counselor went on to describe that

> She seemed to be...emotionally appeared to be more upsetting to her, the more she talked about it...I asked her about talking about it in Court, how she felt about that and she said that she knew that she may have to talk about it and I asked her if she could to that, if she could go to the Courtroom and talk about it in front of people and she would just sit in her chair there at Head Start shaking her head and saying no...no... — I thing at that point she really...I don't think it was something that she could do.

(doc. 8. T-83). When asked if she thought that the child would suffer at least moderate emotional trauma or harm if she were required to testify in open court (the precise verbiage of Fla.Stat. § 92.54(1)), witness answered affirmatively. (doc. 8, T-84).

At the conclusion of the brief pre-trial hearing, the trial court granted the state's motion to have the child testify by closed circuit television, and made the single finding there exists "a likelihood that she would suffer at least moderate emotional or mental harm from testifying in open court." (doc. 8, T-86). During the trial, the child testified in a room separate from the courtroom and in the presence of only the judge, the prosecutor, and the defense attorney[3]. Her

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3 An issue has not been raised relative to the physical separation of petitioner and his attorney during this phase of the trial. Defense counsel was permitted to cross-examine the child.

testimony was transmitted electronically to the courtroom where the jury and the petitioner could see and hear her on a television monitor. The child was not able to see the petitioner while she testified.

In initial response to the petition for writ of habeas corpus, the state argued that the trial court's factual finding of potential harm to the child if she was required to testify in open court is subject in this habeas proceeding to the presumption of correctness afforded by 28 U.S.C. § 2254(d). Further, the state distinguishes this case from *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), and argues, based upon Justice O'Connor's concurring opinion in *Coy,* the constitutional validity of Fla.Stat. § 92.54 (State's response, doc. 9).

During the pendency of this action, the Supreme Court issued a decision in *Maryland v. Craig,* ___ U.S. ___, 110 S. Ct. 3157, 111 L.Ed.2d 666 (1990). When the parties were directed by the undersigned to address the recent *Craig* decision (doc. 10), the state suggested that *Craig* is inapplicable to the analysis of petitioner's claim since petitioner's conviction became final before *Craig* was decided (doc. 11). *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Second, the state suggested that the harmless error doctrine would prohibit the granting of collateral relief. Finally, the state reemphasized the lack of necessity for an evidentiary hearing to be held. Predictably, petitioner first conversely argued that the recent *Craig* decision is applicable and, because the trial court's finding and the supporting evidence fall short of that found necessary by the majority in *Craig,* this court should immediately grant habeas corpus relief without the scheduling of an evidentiary hearing in this forum (docs. 12, 13). In the alternative, petitioner argues that, if the *Craig* decision is not retroactively applied in this habeas review, earlier

precedent, including *Coy v. Iowa,* mandates the granting of habeas relief.

Before this court addresses the merits of petitioner's claim, the appropriate standard for adjudging a claim based upon an alleged violation of confrontation right, arising from a conviction that became final in March, 1989, must be determined. Accordingly, the two recent Supreme Court cases referred to by the parties must be closely examined.

I. *Coy v. Iowa*

Decided after petitioner's trial but before his conviction became final, the majority in *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), found that a screen placed between the testifying child witnesses and the defendant, which effectively blocked the defendant from the witnesses' sight during their trial testimony, constituted a violation of the defendant's constitutional right to a face-to-face encounter with his accusers. The Supreme Court reiterated its statement in *Pennsylvania v. Ritchie,* 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), that the "Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination". 487 U.S. at 1017. In writing for the majority of the court, Justice Scalia emphasized that face-to-face confrontation is essential to the fairness of a trial and ensures the integrity of the fact-finding process. This face-to-face confrontation involves the defendant's being able to see and observe those who testify against him at trial *and* the defendant's right to have those witnesses provide their testimony in his presence. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." 487 U.S. at 1019.

While the *Coy* court recognized that certain rights conferred by the Confrontation Clause are not absolute, it found that a defendant's right to literal confrontation may give way "only when necessary to further an important public policy". Unless an exception to face-to-face confrontation is "firmly rooted in our jurisprudence", there must be specific, individualized findings that a particular witness requires special protection for the public policy concern to outweigh a defendant's Sixth Amendment right. 487 U.S. at 1021. The court chose to "leave to another day" the question as to what exceptions to literal, physical confrontation actually exist. *Id.*

II. *Maryland v. Craig*

Decided slightly more than one year after petitioner's conviction became final, the Supreme Court in *Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), reviewed a conviction for child abuse and sexual offenses toward a six year old victim. The child witness testified at trial by means of a one-way closed circuit television after the trial judge found that the child's testimony in the courtroom would result in the child suffering "serious emotional distress such that the child cannot reasonably communicate." In the majority opinion, Justice O'Connor recalled the observation made in *Coy* that the Constitution guarantees a defendant a face-to-face meeting with witnesses appearing before the trier of fact, but again emphasized that the Confrontation Clause guarantee is not absolute, but rather "reflects a preference for face-to-face confrontation at trial that must occasionally give way to considerations of public policy and the necessities of the case". 111 L.Ed.2d at 681. Because the trial court in *Craig* made individual findings as to the necessity for protecting the child witness from the trauma of testifying in open court, the Supreme Court sought to resolve the question reserved in *Coy* as to possible

exceptions to a defendant's right to literal face-to-face confrontation.

The majority of the court concluded that a procedure using one-way closed circuit television as in the *Craig* trial may be specifically necessary to further a state's interest in protecting minor victims of sex crimes from further trauma and embarrassment. When such a procedure is necessary to further an important state interest, a violation of the Confrontation Clause's guarantee of a face-to-face encounter between the accused and the accuser is justified. For a state to adequately show necessity, however, the trial court must hear evidence and determine 1) "whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness", 2) "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant", and 3) that the emotional distress suffered by the child witness by testifying in the presence of the defendant is more than *de minimis, i.e.,* such as trauma which impairs the child's ability to communicate; more than "mere nervousness or excitement or some reluctance to testify". 111 L.Ed.2d 685, 686.

The Supreme Court agreed with the Maryland Court of Appeals that, under the requirements set forth in *Coy v. Iowa,* the trial court's finding of necessity cannot be framed in terms of the child witness' general inability to testify in the courtroom setting, but must be framed in "much narrower terms of the witness's inability to testify in the presence of the accused". 111 L.Ed.2d 686. Nevertheless, the court declined to establish, as a matter of federal constitutional law, precise categorical evidentiary prerequisites for the use of a one-way television procedure.

III. Is *Maryland v. Craig* To Be Applied Retroactively?

The threshold question of this court's analysis is whether petitioner is entitled to the retroactive benefit of the ruling in *Maryland v. Craig* which was decided after his conviction became final. Under the retroactivity doctrine set forth by the Supreme Court in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), a petitioner seeking collateral relief may not obtain the benefit of a new constitutional rule announced after a petitioner's conviction has become final, unless the rule fits within one or two exceptions to the general retroactivity bar. Thus, the immediate question is whether *Maryland v. Craig* constitutes a "new rule."

In *Butler v. McKellar,* 494 U.S. 407, 110 S.Ct. 1212, 1216, 108 L.Ed.2d 347 (1990), the Supreme Court, in referring to *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) and *Teague,* 103 L.Ed.2d 349, emphasized that a new rule of constitutional interpretation is one that "breaks new ground or imposes new obligations on the States or the Federal government". "A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (emphasis in original). *Id.* In other words, if the result of a case would be susceptible to debate among reasonable minds, then it is a new rule. *Id.* This new rule principle validates and avoids disturbing "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary by later decisions." 110 S.Ct. at 1217. Thus, the habeas court must decide whether a state court, considering petitioner's claim at the time it became final, would have felt compelled by existing precedent to conclude that the ruling petitioner seeks was compelled by the Constitution. In other words, the habeas court must decide whether a conviction rests upon the correct application of the law in effect at the time of the conviction. By applying this "new

rule" criteria, potential inequities are eliminated which result when a petitioner receives the benefit of a new rule but when that rule had not been applied earlier to those similarly situated. *Teague* 109 S.Ct. at 1077. The *Teague* court advised that it is "sounder in adjudicating habeas petitions generally to apply the law prevailing at the time a conviction becomes final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." *Id.*

Probative in the analysis of whether a case announces a new rule are the results the Supreme Court and other courts have reached in subsequent cases interpreting the precedent setting case. Subsequent decisions may assist this court in determining whether the result petitioner seeks was or was not dictated by precedent prior to the *Craig* decision. *See, e.g., Hardy v. Wigginton,* 922 F.2d 294 (6th Cir. 1990)(essentially finding *Coy v. Iowa* announces a "new rule" under *Teague*). Courts have recognized that this "new rule" analysis is not a simple one and is particularly difficult when trying to distinguish, in a case which does not explicitly overrule an earlier holding, whether that case has announced a new rule or whether it simply extended the reasoning of prior cases. *Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Penry v. Lynaugh, supra.* In *Butler,* the Supreme Court instructed that, merely because a decision is within the "legal compass of" or "controlled" by an earlier decision, such is not conclusive in determining that the latter case does not announce a new rule as long as reasonable contrary conclusions are possible. 108 L.Ed.2d at 356.

With the above in mind, the undersigned concludes *Maryland v. Craig* does not establish a "new rule" as addressed in *Teague.* In *Coy v. Iowa,* the majority of the court emphasized and traced through historical, literary, legal examples the importance of face-to-face confrontation by

an accused with witnesses testifying against him. The Confrontation Clause of the Constitution was clearly interpreted as having an "irreducible literal meaning": "a right to *meet face-to-face* all those who appear and give evidence at *trial*" (emphasis in original). 101 L.Ed. 2d 867. As noted earlier, the *Coy* court concluded that the placing of a screen between the defendant and a child witness, which prevented the child from seeing the defendant during her testimony, was an "obvious" and "damaging violation of the defendant's right to a face-to-face encounter". 101 L.Ed.2d at 866. In *Craig v. Maryland,* the court did not deviate from or substantially change the primary dictates of *Coy* — that is, a defendant has a constitutional right to see his accusers and the right to have his accusers be able to see him as they testify at trial, unless there exists some important public policy which the trial court finds will be specifically and particularly furthered in denying literal confrontation in an individual situation. Rather, the *Craig* decision was dictated by the court's previous holding in *Coy* and constitutes an application of the reasoning and analysis *Coy* set out. *Craig* reinforces the principles relied upon in *Craig* and reaffirms its holding. *See Penry v. Lynaugh, supra.*

More specifically, *Craig* repeats the *Coy* conclusion that the Confrontation Clause guarantees a defendant with a face-to-face meeting with witnesses appearing before the trier of fact and serves to ensure the integrity of the factfinding process. *Coy,* 101 L.Ed.2d at 864, 866; *Craig,* 111 L.Ed.2d at 677, 679. If an exception is to be found to this literal right of confrontation, it shall be only when necessary to further an important public policy. *Coy,* at 867; *Craig,* at 682. To confirm the level of necessity to overcome the defendant's right, a trial court must make individualized findings that this particular witness needs special protection. *Coy,* at 867; *Craig,* at 685. The special protection afforded must be necessary specifically to reduce or eliminate trauma which would result to the child by testifying in the defendant's

presence since it is the face-to-face meeting between the defendant and the witness that is being sacrificed. *Coy,* at 867; *Craig,* at 685. Finally, to show necessity, the trauma which may be suffered by the child by being in the defendant's presence must be more than that which upsets the victim, or constitutes a reluctance or nervousness to testify. *Coy,* at 866; *Craig,* at 685.

As mentioned earlier, the decisions of subsequent cases interpreting a previous case which announces a new rule may assist in determining whether a later case announces a separate new rule or simply applies the reasoning of the former precedent. Indeed, the Maryland courts obviously interpreted *Coy v. Iowa* as requiring (1) individualized judicial findings, (2) a showing of trauma to the witness resulting from testifying in the presence of the defendant, and (3) a showing of potentially serious physical or psychological harm to the witness. These specific requirements were approved by the Supreme Court in *Craig*. It is also noted that after *Coy v. Iowa,* even the Florida Supreme Court recognized the necessity of an individual determination for each child witness that further harm would result if that child was required to testify "in open court *in the presence of the defendant.*" (emphasis added). *Glendenning v. State,* 536 So.2d 212, 218 (Fla. 1989), *cert. denied,* 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989).

It might be said that, since *Coy v. Iowa* "left for another day" what exceptions to a defendant's literal right to confrontation exist, *Craig v. Maryland* announced "new law" by recognizing the existence of an exception, after a proper showing of necessity, based upon a state's "compelling" interest in protecting "minor victims of sex crimes from further trauma or embarrassment". If the "child sex abuse victim" exception is categorized as "new law", however, such would clearly fall outside of the policy and doctrinal reasons discussed in *Teague* which justify barring the application of

a new rule retroactively. As was the case in *Thomas v. Murphy,* 735 F.Supp. 318 (N.D. Wis. 1990), it would then be the state (rather than the petitioner) asking the court to apply the new rule establishing a viable exception to the defendant's right to face-to-face confrontation; in that circumstance, retroactive application would not result in inequities with other similarly situated persons. Nevertheless, the undersigned recognizes that by emphasizing the Sixth Amendment provides only a "preference" for literal confrontation rather than an absolute right and by defining a specific exception to a defendant's right to confrontation, the court in *Craig* broadened the *Coy* majority's[4] view of the "explicit constitutional text" which guarantees face-to-face confrontation between accused and accuser.

In concluding that *Maryland v. Craig,* as it applies to the case at hand, does not constitute a new rule of constitutional interpretation, the undersigned acknowledges and advises the district court that, despite extensive research, this is an issue of first impression; the applicability of the restrictive *Teague* retroactivity rule has not been directly addressed by other courts sitting in collateral review of a confrontation challenge comparable to that in *Craig.* The court notes *Spigarolo v. Meachum,* 934 F.2d 19 (2d Cir. 1991), in which the Second Circuit applied the holdings of both *Coy* and *Craig* in it collateral review of a 1986 state conviction. Although the *Spigarolo* court did not discuss the retroactivity issue, it presumably deduced that it was not prohibited from considering the holding in *Craig* in its analysis. Closely

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4 Justices Scalia, Brennan, White, Marshall, Stevens and O'Connor formed the majority in *Coy.* (Justice O'Connor authored a concurring opinion in which Justice White joined.) But for Justices White and O'Connor, the majority of the court in *Coy* formed the dissenting faction of the court in *Craig.* The *Craig* dissenters strongly express their disapproval of the *Craig* majority's "interest-balancing analysis where the test of the Constitution simply does not permit it." 111 L.Ed.2d at 694.

analogous and also persuasive is *Thomas v. Murphy, supra,* in which the district court concluded, that when required in habeas review to determine whether certain circumstances qualify as an exception to *Coy,* such did not result in the announcement of a new rule but rather in an application of closely analogous law. The court reasoned that:

> *Coy* held that face-to-face confrontation was at the core of the confrontation clause and left for another day the question of what kind of findings might support an exception to that ruling. Petitioner is requesting merely an application of that main ruling in *Coy* that the use of a screen deprived him of his right to confront his accuser face-to-face.

775 F.Supp. at 323. It is finally noted that, although prior to *Teague,* rulings implicating a defendant's right of confrontation have been held to apply retroactively. *See, e.g., Roberts v. Russell,* 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968)(holding that *Bruton v. United States,* 391 U.S. 123 (1968) is to be applied retroactively).

In conclusion, this court finds that the Supreme Court's ruling in *Craig v. Maryland* was an application of the holding in *Coy v. Iowa* and not an announcement of a new rule as defined by *Teague* and its progeny. Thus, the *Craig* ruling may be properly considered in evaluating the case now under review.

IV. Analysis of the Merits

As discussed above, the Supreme Court in *Maryland v. Craig* held that, while the Sixth Amendment Confrontation Clause guarantees the criminal defendant a face-to-face meeting with witnesses appearing before the trier of fact, in certain narrow circumstances, "competing interests, if

closely examined, may warrant dispensing with confrontation at trial." 111 L.Ed.2d at 680. Only when necessary to further an important public policy and where the reliability of the testimony is otherwise assured may a defendant be denied his right to a physical, face-to-face confrontation. The reliability of the testimony may be ensured by means of a finding of competency of the witness to testify under oath by cross-examination, and by providing an opportunity for the defendant to fully view the demeanor of the witness as the testimony is given. A procedure such as the use of one-way closed circuit television, where the witness is physically separated from the defendant while testifying, is constitutionally acceptable if the necessity of such a procedure is established. The critical inquiry is whether the use of the procedure (even if statutorily created and approved) is necessary.

Thus, a state's interest in the psychological and physical well-being of a child abuse victim may constitute a sufficient public interest to outweigh a defendant's right of physical confrontation; nevertheless, the trial court must hear evidence and determine if the one-way television procedure is necessary to protect the particular child witness from being seriously traumatized by being in the physical presence of the defendant while testifying at trial.

With respect to the undisputed circumstances of petitioner's trial, this court recognizes that it was the intent of the Florida legislature in enacting Section 92.54 to protect child abuse victims from further psychological and emotional damage. *See, e.g., Glendenning v. State,* 536 So.2d at 216. In spite of the state interest and arguable compliance with the state statute, however, in this instance the showing of necessity, to deprive petitioner Cumbie of his guaranteed right of confrontation as defined within *Coy v. Iowa* and *Maryland v. Craig* and so as to overcome a federal constitutional challenge, is found to be inadequate.

A. The source of the trauma.

First, as emphasized in both *Coy* and *Craig*, a face-to-face encounter by the defendant with his accuser forms the "core of the values furthered by the Confrontation Clause" and is part of the adversarial testing of evidence that enhances the accuracy of the fact-finding process. ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back'...That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Coy*, 101 L.Ed.2d at 866. To deny the right of confrontation is not justified unless it is the presence in the courtroom generally — that creates the harmful trauma. *Craig*, 111 L.Ed.2d at 685.

The record before the court in the instant petition fails to show that the trial judge considered the precise source of the potential trauma to the child witness. The court's finding in approving the one-way television procedure addressed solely the effect upon the child of being asked to repeat her testimony in the courtroom. Moreover, the brief testimony presented as to the harm which may be suffered by the child, and upon which the trial court relied in making its critical finding, focused solely upon the child being called upon to present her testimony in the courtroom and whether she was able and "could do" it — *i.e.*, "if she could go into the courtroom and talk about it in front of people". (doc. 8,

T-83)[5]. The brief testimony presented strongly implies that it was the experience of having to repeat over and over what happened to "so many different people" that was "emotionally upsetting" the child. *Id.*

The record before this court is devoid of evidence of potential trauma (or even "emotional upset") that may be caused to this particular child as a result of her testifying in the same room as the defendant. There is no record evidence that the child was even concerned of seeing or being in the same room as the defendant.[6] Indeed, the child's testimony at trial (via television monitor) suggests the child was far from being afraid of the defendant or traumatized by his presence:

> Q: [The cameraman] is going to take your picture and you are going to be on TV.
>
> A: Oh boy. On everybody elses TV?

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5 The trial court was briefly advised of the child's behavior and level of maturity: "She's very verbal, very talkative...and doesn't respond well to direct questioning. She is more likely to give you more information just in a spontaneous manner rather than if you ask her direct questions...she may or may not respond if you ask her...she may sit there with no response...she cries alot...she's whiney and she gets real upset and does not play well with other children, if she does not have her way." (doc. 8, T-81). The testimony does not set out whether this behavior preceded the charged sexual abuse or preceded the child's repeated interviews and counseling sessions.

6 The undersigned rejects the state's suggestion that the child's response to a single question regarding the petitioner's alleged ejaculation supports a conclusion that the child would have been traumatized by the petitioner's presence. Based upon the non-responsive nature of the child's statement, her lack of reluctance to answer the preceding and subsequent questions, and the uncertainly of the witness' true meaning in making the statement (the transcript is replete with misspellings and obvious transcription errors), this court cannot resort to such speculation to support a decision relative to important constitutional rights. *See,* doc. 11, p. 7; doc. 8, T-133, line 16.

Q: Not everybody elses TV. Just the TV for a few people out in the courtroom to see you. You will be here with us.

. . .

Court: Okay, now we are going to make sure everybody out there can see you in the other room. Okay?

A: Hey Daddy. I know that Daddy is out there because I saw his jacket. My Daddy has a beard.

. . .

A: Can I say hi to my daddy?

State: Yes, you can, say hi to your Daddy.

A: Hi Daddy.

. . .

A: Can you tell my Daddy that I like to be called Jim?

Q: I think he probably heard you....

. . .

Q: They can probably hear everything that you are saying and they probably saw every face you made. You want to tell them bye-bye? Tell them bye.

A: Bye-bye. By folks...See you later alligator?

(doc. 8, T., pp. 124-142).

In light of the aforesaid, the undersigned concludes that the state failed to show the necessity of depriving the petitioner of his right to a face-to-face confrontation with his step-daughter as she provided the jury with crucially damaging testimony against him. No evidence has been

presented to establish that the presence of the petitioner would result in significant trauma being suffered by the child. Thus, a constitutional violation must be found.

The respondents argue that the specific finding required by Fla.Stat. 92.54, and as made by petitioner's trial judge, has been approved by the Supreme Court. Respondents point to Justice O'Connor's concurring opinion in *Coy,* and to dictum in the majority *Craig* opinion. In *Maryland v. Craig,* Justice O'Connor wrote for the majority:

> That a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.

She then referred to her concurring opinion in *Coy* in which she wrote:

> Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures.

111 L.Ed.2d at 683, 101 L.Ed.2d at 868. She noted that "24 States have authorized the sue of one-way circuit television testimony in child abuse cases," listing in footnote Fla.Stat. § 92.54 among other statutes. 111 L.Ed.2d at 684. In *Coy,* Justice O'Connor explained that many of the various state's procedures "may raise no substantial Confrontational Clause problem since they involve testimony in the presence of the defendant", and certainly implied that those which

preclude the literal presence of the defendant "run afoul" of the Clause's requirements. 101 L.Ed.2d at 868. She later mentions in the same concurring opinion:

> £if a court makes a case specific finding of necessity, as it required by a number of state statutes, *see, e.g.,* ...Fla.Stat. § 92.54(4),...our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.

101 L.Ed.2d at 870.

From a close reading of both opinions, the undersigned concludes that Justice O'Connor's mention in the *Craig* decision of Fla.Stat. § 92.54 was to illustrate the public's concern for child abuse victims testifying at trial, in support of the court's conclusion that there exists a compelling state interest which justifies an exception to a defendant's right to face-to-face confrontation. Neither the majority opinion in *Craig,* however, nor the concurring opinion of the two justices in *Coy,* "specifically approve" or explicitly establish that the Florida Statute on its face passes constitutional muster. The concurring opinion in *Coy,* of course, has no precedential value, and the *Craig* court clearly held, even where there exists a protective, well-intentioned legislative enactment, the state must make an "adequate showing of necessity" which addresses the trauma caused by the presence of the defendant rather than by the general circumstances of the courtroom before a defendant's liberal confrontation right can be sacrificed.

B. The extent of the trauma

Second, as noted earlier, to establish the necessity required to deprive a defendant of his confrontation right, there must be a showing of resulting emotional distress to the witness that is "more than *de minimis*". *Craig,* 111 L.Ed.2d at 685. The state must establish an "important interest"; the defendants' right must only give way so as to "further an important public policy". *Coy,* 101 L.Ed.2d at 867. More specifically, the potential trauma must be more than such which "upset(s) the truthful rape victim or abused child", or "causes nervousness, excitement or reluctance" to testify. *Craig,* 111 L.Ed.2d at 685; *Coy,* 101 L.Ed.2d at 866.

The Maryland statute approved by the Supreme Court in *Craig* established a pre-trial procedure which required a finding by the trial court that a child witness will suffer "serious emotional distress such that the child cannot reasonably communicate" before the child is allowed to testify outside of the presence of the defendant. The Iowa statute disapproved by the Supreme Court in *Coy* set no precise standard to be satisfied before the defendant could be separated from a child witness, thus relying upon a "legislatively imposed presumption of trauma". The *Coy* majority found that "something more than [this] type of generalized finding underlying such a statute is needed when the exception is not 'firmly...rooted in our jurisprudence' " 101 L.Ed.2d at 867 quoting *Bourjaily v. United States,* 483 U.S. 171, 183, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

In this instance, the expert witness testified, and the court found, that there exists "a likelihood that [the child] would suffer at least moderate emotional or mental harm from testifying in open court", the exact requirement of Fla.Stat. § 92.54. Even if this court assumes that the Florida statute requires a showing of more than a *de minimis* harm, the record now before this court fails to support a finding of

significant (or even moderate) trauma would be suffered by this child witness if she was required to testify in the presence of the defendant. The testimony presented to the state court demonstrates, at best, a reluctance on the part of the child witness to testify, that is, to again tell what happened to another group of people. While it may "upset" her, there is no additional evidence from which the court could conclude that potentially significant emotional distress may be suffered by this child if required to testify in the presence of petitioner.

As detailed within both the *Coy* and *Craig* decisions, a statement by a judicial officer of individualized and specific findings relative to the necessity of providing special protection to a particular child witness is essential so as to justify the deprivation of a defendant of his constitutional right of confrontation. *Coy*, 101 L.Ed.2d at 867; *Craig*, 111 L.Ed.2d at 685. The respondents suggest the state court's finding that there exists a likelihood that the child will suffer at least moderate emotional or mental harm, in strict and narrow compliance with Fla.Stat. § 92.54, is a factual finding to which this habeas court must apply a presumption of correctness. 28 U.S.C. § 2254(d).

Section 2254(d) of Title 28 establishes that a state court's factual finding, "supported by reliable and adequate written indicia, shall be presumed to be correct" unless the habeas petitioner establishes that the state proceeding was deficient in one of eight specific respects. *Thomas v. Zant*, 697 F.2d 977, 986 (11th Cir. 1983). Subsection (d)(3) of Section 2254 exempts from the presumption of correctness those state court findings of historical fact upon which the record reveals "material facts were not adequately developed at the state court hearing"; subsection (d)(8) exempts findings for which there does not exist fair support within the record. The undersigned finds that both of the aforementioned

subsections apply; the presumption of correctness in this instance cannot be relied upon.

As noted *infra,* the pretrial hearing, after which the trial judge made the finding that there exists a likelihood that the child would suffer at least moderate emotional trauma or harm if she were to testify in open court, was exceedingly brief. The child's mental health counselor testified that the child "felt real sad and tired because she was just tired of answering questions" and she "emotionally appeared to be more upset" ~~the more she talked a~~bout it (doc. 8, T-81, 83). The counselor speculated that she did not think that talking about it in a courtroom "in front of people — was something that she (the child) could do". *Id.* The expert witness concluded her testimony by answering "yes" to the prosecutor's question as to whether she thought the child would suffer at least moderate emotional trauma or harm if she were required to testify in open court (doc. 8, T-84). Upon this record alone, the trial court made its Section 92.54 finding.

The sparse record evidence presented at the hearing was insufficient and inadequate for the trial court to base its finding of trauma. This failure to develop the underlying facts necessary to make and support the court's finding of potential harm prohibits this court's deference to that finding. *See Purvis v. Dugger,* 932 F.2d 1413, 1428 (11th Cir. 1991); *Brown v. Dugger,* 831 F.2d 1547, 1553, fn. 9 (11th Cir. 1987); *Darden v. Wainwright,* 767 F.2d 752, 759-60 (11th Cir. 1985); *Coleman v. Zant,* 708 F.2d 541, 545-6 (11th Cir. 1983); *Eutzy v. Dugger,* 746 F.Supp. 1492, 1498-9 (N.D. Fla. 19898). *See also Thomas v. Zant,* 697 F.2d at 987 (and cases cited therein). Without the presumption of correctness, this court cannot conclude from the exceedingly limited record before it that this individual child witness required the specific protection afforded by the Florida statute.

Additionally, and again assuming that Fla.Stat. § 92.54 provides a constitutionally acceptable protection for an important public policy which outweighs a defendant's right to face-to-face confrontation, it is doubtful that the requirements of the Florida statute were satisfied by the trial judge in this case. Section 92.54(5) requires the state court to "make specific findings of fact, on the record, as to the basis for its ruling under this section." In this instance, the trial judge failed to articulate any specific findings upon which the Section 92.54 determination was based. The trial court's failure to satisfy Section 92.54(5) is more than an issue of state law (not generally subject to habeas review); the very absence of individualized and specific factual findings requires this court to conclude, pursuant to the dictates of *Coy* and *Craig,* that the state failed to establish that an exception to the Confrontation Clause's literal provision was necessary to further an important public policy. In other words, without these specific and individualized findings of necessity, this court must again conclude that the petitioner's Sixth Amendment confrontational right was violated. *Coy, supra.*

For the foregoing reasons, first, lack of evidence that the child would suffer potential trauma from testifying at trial in the presence of the defendant, second, the lack of evidence establishing the potential harm to the child would be more than *de minimis,* and third, the lack of individualized and specific factual findings of necessity, the undersigned concludes that petitioner Cumbie's Sixth Amendment right to confrontation was violated by use of the one-way television monitor at trial.

V. Alternate Considerations

In recommending the foregoing analysis, the undersigned appreciates that the district court may prefer to consider an alternate analysis in resolving the issue petitioner raises. If this court is persuaded (contrary to the above discussion) that *Maryland v. Craig* actually announces a "new rule" of constitutional interpretation as discussed in *Teague,* the next question to be addressed is whether the holding in *Craig* fits into one of the two exceptions discussed in *Teague* which would permit its retroactive application.

Maryland v. Craig clearly does not fit into the first *Teague* exception; *Craig* certainly does not place certain "primary, private individual conduct" beyond the power of the law to prescribe. The second *Teague* exception addressed those "watershed rules of criminal procedure" which implicate the fundamental fairness of the criminal proceeding. The test of the *Teague* second exception has been interpreted as having dual characteristics in addressing those procedures implicit in the concept of ordered liberty and those procedures "without which the likelihood of an accurate conviction is seriously diminished". *Teague,* 109 S.Ct. 15 1075, 1077. The only example the Supreme Court has given of a criminal right and procedure which qualifies for retroactive application within the second exception is a defendant's right to counsel at trial. *Saffle v. Parks,* 110 S.Ct. at 1264, citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Supreme Court has found most new rules examined to fall outside the scope of this exception. (*E.g.,* rule extending the Sixth Amendment to require a fair cross section of community on a petit jury not within exception, *Teague, supra;* rule extending Eighth Amendment to prohibit instruction to jury not to be swayed by sympathy for the defendant in a death case not within exception, *Saffle, supra;* rule extending Fifth Amendment prohibition of police initiated interrogation when suspect has requested

counsel in context of a separate investigation not within exception, *Butler, supra. Caldwell* error not within exception, *Sawyer v. Smith,* ___ U.S. ___, 110 S.Ct. 282, 111 L.Ed.2d 193 (1990), *see also Johnson v. Dugger,* 932 F.2d 1360 (11th Cir. 1991). While the Eleventh Circuit has found a defendant's right to counsel at arraignment does not fall within exception, it has held that the due process prohibition against shifting the burden of proof to a criminal defendant (*Sandstrom* error) is such a "bedrock criminal procedure" which implicates the accuracy of a conviction that it is to be applied retroactively under the *Teague* second exception. *Hall v. Kelso,* 892 F.2d 1541 (11th Cir. 1990).

The undersigned concludes that, if this court deduces that *Craig* announces a new rule of constitutional interpretation, it should also find, in accordance with the majority opinion in *Craig,* that the rule is not one which qualifies as a watershed rule of criminal procedure which is implicitly grounded in our concept of ordered liberty.[7] *Accord, United States v. Johnpoll,* 748 F.Supp. 86, 91 (S.D. N.Y. 1990), *aff'd.* 932 F.2d 956 (2nd Cir. 1991) (finding *Coy v. Iowa* does not fit within *Teague* second exception).

Nevertheless, even if this court concludes that *Maryland v. Craig* states a new rule, does not fall within the second *Teague* exception, and is not to be applied retroactively, the final analysis of the petition is essentially unaffected due to the Supreme Court's earlier decision in *Coy v. Iowa.* In petitioner's case, the Florida appellate court was bound to

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7 Recognizing an obvious inability to forecast the views of the Supreme Court, the undersigned suggests there is some likelihood that the *Craig* dissenters led by Justice Scalia strongly believe that the right to face-to-face confrontation is one "without which the likelihood of an accurate conviction is seriously diminished" and may qualify for retroactive application under the second *Teague* exception.

apply the standards set forth in *Coy v. Iowa* since it was decided before petitioner's conviction became final.

Pursuant to *Coy v. Iowa,* as discussed above, the Supreme Court clearly held that a defendant is guaranteed by the Sixth Amendment a face-to-face encounter with those witnesses who testify before the trier of fact. Any exception to that guaranteed right must be based upon a necessity to further an important public policy. *Coy* declined to affirmatively find the existence of an exception in sexual abuse prosecutions in cases involving children. In applying *Coy* to the facts before the court (and disregarding *Craig v. Maryland*), the undersigned concludes that a constitutional violation occurred. Even if the state court relied solely upon the concurring opinion supported by two justices of the court, there still is no escaping that individual findings were not made, nor supporting evidence presented, to establish that this particular child witness required the protection of testifying by closed-circuit television, outside the presence of the defendant, due to the trauma that she would be caused to suffer if she testified before the jury in the defendant's immediate presence. While the judge may have had the proper statutory standard in mind when addressing the potential harm to the child, the record is grossly insufficient of evidence to establish that standard was satisfied. *See Leggett v. State,* 565 So.2d 315 (Fla. 1990). The evidence adduced at the pre-trial hearing prior to the court's Section 92.54 finding falls well short of a "close examination of competing interests" which even Justice O'Connor in her concurring opinion found to be essential to overcome the confrontation preference to face-to-face confrontation.

Under this alternative analysis, the undersigned again concludes that petitioner's Sixth Amendment right to confrontation was violated.

VI. Harmless Error

This court's inquiry does not end with a finding of constitutional error; the respondents suggest that even if a constitutional violation is found, the harmless error doctrine prohibits the granting of collateral relief.

A violation of Confrontation Clause protections based upon the denial of face-to-face confrontation is subject to being found harmless beyond a reasonable doubt under the *Chapman v. California* standard. 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Coy,* 101 L.Ed.2d at 867. To determine whether a confrontational error is harmless error, a court must analyze: 1) the importance of the witness' testimony to the prosecution's case; 2) whether the testimony was cumulative; 3) the presence or absence of corroborating or contradicting testimony on material points; 4) the extent of cross-examination; and 5) the overall strength of the prosecution's case. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Justice Scalia instructed in *Coy,* however, that "an assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation" for such would involve "pure speculation". *Id.* Harmlessness must be determined solely on the basis of the remaining evidence.

In this instance the child's testimony at trial via the television monitor was undoubtedly important and persuasive evidence in the state's case. The child told the jury that the defendant showed her "dirty pictures" in magazines, had her place her mouth on his penis, told her to drink the "gray and real crazy stuff" that came from his penis (which he called "candy"), and touched her vaginal area with his mouth and finger. The child additionally testified that she played "dirty games" with her nine year old brother and

fourteen year old male cousin. These games involved the children touching each other's genitals with their mouths and fingers. Also presented as part of the state's case at trial were nearly identical statements that the child had made previously to a state counselor and an examining physician. The physical evidence of abuse discovered by the physician corroborated the child's recitation of her experiences, but was inconclusive in establishing the recency of the damage or that the defendant was the perpetrator. The remaining prosecution evidence consisted of testimony that corroborated that, at the time of day that these events allegedly occurred according to the child, the defendant was alone with her in the house.

The defendant testified at trial. He admitted that he kept in the house a substantial number of magazines which display nude persons performing sexual acts and that he looked at those magazines in the children's presence and found the children looking at them on one occasion. Nevertheless, he denied having committed any of the acts upon his step-daughter as she reported. He testified that his step-daughter is accusing him of performing these acts only to cover-up and protect her brother and cousin.

Although the child's live (televised) testimony at trial was certainly important to the state's case, a nearly identical version of the facts was presented to the jury through her prior statements to the counselor and physician.[8] The

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8 The propriety of the trial court's admission of this hearsay evidence under Florida Evidence Code 90.803(23) was not raised at trial nor has it been argued in this habeas petition. For purposes of this analysis, therefore, this evidence shall be considered as properly admitted. *See, Jones v. Dugger,* 888 F.2d 1340 (11th Cir. 1989); *Nelson v. Farrey,* 874 F.2d 1222 (7th Cir. 1989); *United States v. Dorian,* 803 F.2d 1439 (8th Cir. 1986). (Defendant's trial counsel did object to the cumulative nature of this evidence.)

defendant's denial of the criminal, abusive acts was the only contradictory evidence heard by the jury — and he, in part, corroborated her recitation. The defendant throughout the trial was not restricted in his cross-examination of any of the witnesses. Indeed, the cross-examination of the child at trial was apparently deliberately limited so as to emphasize, in furtherance of the theory of the defense, the witness' sexual activity with her brother rand cousin. (It is also plausible that the cross-examination was kept brief simply due to the fact that, throughout the child's trial testimony, her attention and concentration often faltered.) Lastly, as pointed out by respondents, the record fails to show that the petitioner objected or presented any argument opposing the court's decision to have the child testify by closed circuit television monitor as permitted by Fla.Stat. § 92.54 (doc. 8, T-85).

Having carefully examined the entire record, the undersigned concludes that the unconstitutional denial of face-to-face confrontation in this instance was harmless beyond a reasonable doubt. For this reason, the petition for writ of habeas corpus should be denied.

Title 28, United States Code, Section 636, and Local Rule 27(B) of this court permit any party to object to these proposed findings, recommendations or report within ten (10) days after being served with a copy thereof. Any objections shall be in writing and shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Objections shall be filed with the clerk of the court and copies served on the magistrate and all other parties. Any party may respond to another party's objections within ten (10) days after being served with a copy thereof.

Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of

factual findings. *United States v. Slay,* 714 F.2d 1093 (11th Cir. 1983), *cert. denied,* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984); *United States v. Warren,* 687 F.2d 347 (11th Cir. 1982), *cert. denied,* 460 U.S. 1087, 103 S.Ct. 1781, 76 L.Ed.2d 351 (1983); *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. Unit B, 1982)(en banc). *See also, Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

It is therefore respectfully RECOMMENDED:

1. The petition for writ of habeas corpus filed pursuant to Title 28, United States Code, Section 2254, should be denied.

2. The clerk of the court should be directed to enter judgment accordingly.

At Pensacola, Florida this 26th day of July, 1991.

/s/

SUSAN M. NOVOTNY
UNITED STATES MAGISTRATE JUDGE

Kenneth Richard CUMBIE, Appellant,

v.

STATE of Florida, Appellee.

No. 87-1512.

District Court of Appeal of Florida,
First District.

March 7, 1989.

David A. Davis, Asst. Public Defender, Tallahassee, for appellant.

Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

THOMPSON, Judge.

Cumbie appeals his conviction and sentence for attempted sexual battery contending, inter alia, that the court erred in sentencing him to 20 years in prison followed by 12 years probation. We agree the court erred as to the sentence imposed.

Cumbie was charged with capital sexual battery but was convicted only of attempted capital sexual battery, a first degree felony for which the maximum sentence authorized by law is 30 years. §§ 775.032(3)(b); 775.04(4)(a); 794.011(2), Fla.Stat. The court therefore erred in sentencing Cumbie to 20 years incarceration followed by 12 years probation as the total sentence exceeds the 30 years that can be legally imposed.

We find no merit to the remaining issues. The conviction is affirmed but the sentence is reversed and this case is remanded for resentencing.

REVERSED AND REMANDED.

WENTWORTH and WIGGINTON, JJ., concur.